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EDRO Corporation d/b/a Dynawash and Vincent Davis

EDRO Corporation d/b/a Dynawash and International Association of Machinists & Aerospace Workers, AFL-CIO. Cases 01-CA-116211 and 01-CA-116225

March 31, 2015

DECISION AND ORDER

BY MEMBERS MISCIMARRA, HIROZAWA, AND JOHNSON

On September 9, 2014, Administrative Law Judge Raymond P. Green issued the attached decision. The Respondent filed limited exceptions and a supporting brief, the General Counsel filed an answering brief, and the Respondent filed a reply brief. In addition, the General Counsel filed limited cross-exceptions and a supporting brief, and the Respondent filed an answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs and has decided to affirm the judge's rulings, findings,¹ and conclusions, to amend the remedy, and to adopt the recommended Order as modified and set forth in full below.²

¹ The Respondent has implicitly excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), *enfd.* 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

No exceptions were filed to the judge's merits findings. The parties' exceptions are limited to the judge's remedy.

The judge misstated the name of the Respondent's vice president of finance, Caroline Wojcicki, and her relationship to the Respondent's president, Edward Kirejczyk, and vice president of operations, Scott Kirejczyk. Wojcicki is the Kirejczyk brothers' sister. These inadvertent errors do not affect the disposition of the case.

² We shall modify the judge's recommended Order to conform to the Board's standard remedial language and in accordance with our decision in *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014). We shall substitute a new notice to conform to the modified Order and in accordance with our decision in *Ishikawa Gasket America, Inc.*, 337 NLRB 175 (2001), *enfd.* 354 F.3d 534 (6th Cir. 2004).

We agree, for the reasons stated by the judge, that a notice-reading remedy is inappropriate in this case. We do not rely, however, on the judge's citation to *Jason Lopez' Planet Earth Landscape, Inc.*, 358 NLRB No. 46 (2012).

AMENDED REMEDY

The judge found that the Respondent violated Section 8(a)(3) and (1) of the Act by discharging employee Vincent Davis on October 29, 2013, for his union activity. The Respondent does not except to that finding. It argues, however, that the judge erroneously ordered the Respondent to reinstate Davis and failed to cut off the backpay period as of either November 5, 2013, or June 9, 2014. We address each of the Respondent's arguments in turn.

1. *The reinstatement order.* The Respondent contracted with Westaff—an employment agency—to screen and refer candidates for a quality inspector position, and, in the event that a Westaff candidate was hired, to provide payroll services for the hiree. Discriminatee Davis was referred by Westaff and, thereafter, hired as a quality inspector. The Respondent contends that Westaff was Davis' sole employer, and therefore the Respondent should not be ordered to reinstate Davis but only to notify Westaff that it has no objection to Westaff referring Davis to work for the Respondent. We disagree.

The judge found that, although Westaff was Davis' "nominal employer," the Respondent was Davis' "real" or "de facto" employer. We find it unnecessary to rely on the judge's findings in this regard because the record establishes that the Respondent was *an* employer of Davis, because it exercised sufficient control over his terms and conditions of employment. See *Recana Solutions*, 349 NLRB 1163, 1164–1165 (2007) (employment agency was "an employer" of temporary day laborers it provided to city sanitation department where, among other things, it selected applicants for positions and set their wage rates). The Respondent selected Davis for his position and determined his wage rate. Through Vice President of Operations Kirejczyk and Engineering Manager Stephen Morris, the Respondent was responsible for Davis' day-to-day assignments, oversight, training, and evaluation. Moreover, the Respondent's contract with Westaff explicitly gave the Respondent the responsibility to supervise Davis, stating that "[c]lient will exercise good judgment and management relating to the day-to-day supervision of Associates. Client will provide appropriate supervision and training" The Respondent does not dispute that it contacted Westaff to terminate Davis' assignment at EDRO and that this action violated Section 8(a)(3) and (1) of the Act. To remedy this unfair labor practice, we order the Respondent, as an employer of Davis, to offer him reinstatement. See, e.g., *D&F Industries*, 339 NLRB 618, 624, 649 (2003) (ordering user firm to reinstate discriminatees); *Skill Staff of Colo-*

rado, 331 NLRB 815, 816, 822 (2000) (ordering user firm to reinstate discriminatee).³

2. *First asserted backpay tolling date.* Before seeking employment through Westaff, Davis had been incarcerated for 9 months after pleading guilty to Connecticut weapon-related felony charges. The Respondent did not learn of Davis' criminal history until November 5, 2013, several days after Davis' discharge. The Respondent argues that had it not already done so, it would have discharged Davis on November 5 upon learning of his weapon-related criminal history because Davis had made statements on October 22 that President Edward Kirejczyk believed were a threat of physical violence. On this basis, the Respondent contends that the Board should not order reinstatement of Davis and should toll the running of the backpay period as of November 5, 2013.⁴

We do not find merit in this argument. On October 22, Davis asked President Kirejczyk for holiday pay. President Kirejczyk denied his request; Davis was a probationary employee, and the Respondent did not provide benefits, including holiday pay, to its probationary employees. According to the credited testimony, the conversation included discussion of the Respondent's difficulty retaining employees, and Davis concluded the conversation by saying, "You get what you give." This is the comment the Respondent contends was a threat. In agreement with the judge, we find that the record fails to establish that Davis' October 22 comment was objectively threatening. Given the context of Davis' holiday pay ineligibility, and Respondent's difficulty retaining employees, we find that Davis' comment referred to the likelihood that employee retention would improve if employees were afforded better terms and conditions of

employment.⁵ Nor can such a comment, standing alone, reasonably be regarded a threat of physical violence. Accordingly, even though Respondent subsequently learned that Davis has a weapon-related criminal history, this does not reasonably transform the "you get what you give" statement into grounds for which the Respondent would have discharged Davis absent his union activity.⁶

3. *Second asserted backpay tolling date.* On June 9, 2014, the Respondent saw for the first time employment forms Davis had completed for Westaff. The Respondent asserts that Davis falsely represented on those forms that he did not have a criminal record, and it contends that even if its preceding argument is rejected, the Board should deny Davis reinstatement and cut off his backpay as of June 9, 2014, because it would have discharged Davis as soon as it learned that he lied about his criminal history on Westaff's application forms. We do not pass on the merits of this issue because, as explained below, this contention is appropriately addressed when this case proceeds to the compliance stage.

On September 27, 2013, a few days before beginning work at the Respondent, Davis completed for Westaff, among other paperwork, a form entitled, "Individualized Assessment," which inquired about criminal history. The form stated in part: "The Company's criminal background check process disqualifies applicants for criminal conviction records only insofar as they are job-related. The Company's process for evaluating job-relatedness focuses on an individualized assessment approach. Please answer the following questions to help us make this determination." Davis wrote "N/A" in large letters diagonally across the first six questions, which asked about crimes and rehabilitation. On October 7, a week after beginning work, Davis completed more forms for Westaff, including an "Application for Employment."

³ *Huck Store Fixture Co.*, 334 NLRB 119 (2001), enf. 327 F.3d 528 (7th Cir. 2003), and *Vemco, Inc.*, 314 NLRB 1235 (1994), enf. denied on other grounds 79 F.3d 526 (6th Cir. 1996), cases cited by the Respondent in which a user firm was not required to reinstate temporary employees provided by an employment agency, are distinguishable because in those cases there was no finding that the user firm was their employer.

As explained below, the Respondent will have an opportunity to prove at compliance that it would have lawfully discharged Davis on June 9, 2014, based on a preexisting, nondiscriminatory company policy. If the Respondent so proves, it will not be obligated to offer Davis reinstatement. Member Miscimarra notes that if the Respondent is obligated to offer Davis reinstatement—an issue the Board leaves to compliance (see below)—it is not precluded from reinstating Davis through Westaff or, potentially, through a successor entity with which the Respondent has a similar arrangement.

⁴ The Respondent has hired other employees with felony records. The Respondent does not argue it would have refused to hire Davis based only on his having a criminal history.

⁵ We disavow the judge's commentary regarding Davis' October 22 statements—including his suggestions that Davis showed "chutzpa" by "aggressively pursuing" a benefit "to which he was not contractually entitled," and that Davis' actions in this regard "would raise questions about his general willingness to accommodate himself to being an employee."

⁶ The Respondent attempts to use management's call to the police on November 5, in response to Davis' posttermination conduct, to establish that it had in fact become alarmed by Davis' October 22 statement after it learned of his criminal history. We do not find this argument persuasive. Following his termination on October 29, Davis sent a series of emails and texts—which were neither threatening nor harassing—to Engineering Manager Morris in an attempt to receive an explanation for his termination. According to Morris' testimony, Vice President of Finance Wojcicki, who had recently discovered Davis' criminal history by searching online, called the police on November 5 after she learned that Davis had been contacting Morris. There is no evidence, however, linking Wojcicki's call to the police to Davis' October 22 statement, and we see no reason why the former has any bearing on the latter.

On that form, he checked the “NO” box next to the question, “Have you ever plead guilty, ‘no contest,’ or been convicted of a felony or misdemeanor . . . ?” The question included, in parentheses, additional instructions for several states. For Connecticut, it instructed, “Please do not complete this question. Instead complete the Connecticut Supplemental Form.” Davis was not given nor did he inquire about a supplemental form.⁷

Without referencing the Westaff forms, the judge stated that Davis “clearly did not make any false statements about [his criminal history] during his hiring process.” We disagree with this conclusion for two reasons.⁸ First, it was obviously false for Davis—whose criminal record included a weapon-related felony—to answer “NO” to a question asking whether he had ever pleaded guilty or “no contest” to, or been convicted of, a felony or misdemeanor. The General Counsel argues that Davis checked the “NO” box because the instructions advised Davis not to respond and to use a separate form. However, this explanation—even if it could otherwise be accepted—is contradicted by the fact that Davis *did* respond, falsely, and there is no evidence that anyone during the application process discussed a supplemental form. Second, although Davis testified that he wrote “N/A” on the individualized assessment form because his crimes were not job-related, any reasonable reading of that form suggests that Davis was expected to provide accurate information concerning his criminal history, and Westaff would make a determination regarding job-relatedness. Thus, the form states that “[t]he Company’s process for evaluating job-relatedness focuses on an individualized assessment approach” (emphasis added). It is also uncontroverted

⁷ The record shows that the Respondent relied on Westaff to screen Davis. Westaff’s federal background check on Davis did not reveal his criminal record in Connecticut.

⁸ In agreeing with his colleagues that the Respondent has the opportunity at compliance to present evidence that it would have terminated Davis on June 9, 2014, Member Hirozawa finds it unnecessary to pass on the judge’s finding that Davis “clearly did not make any false statements about [his criminal history] during his hiring process.” Contrary to his colleagues, Member Hirozawa does not believe that the evidence necessarily shows that Davis “intentionally misrepresented his criminal history” by writing “N/A” over several questions on the individualized assessment form and checking “NO” on the application for employment form, which he completed after he had already started working, in response to a question that he was not supposed to have answered. In addition, the Respondent’s practice of hiring individuals with felony records belies the contention that Davis reasonably should have known that his criminal history was a potential issue during the application process. Moreover, the threshold issue that would need to be resolved in compliance is not whether Davis made an intentional misrepresentation. Even assuming that he did, this alone is not a reason to toll the backpay period. Instead, to toll the backpay period, the Respondent would also need to show that the Respondent had a legitimate, nondiscriminatory company policy of terminating employees for the same terminable offense that Davis allegedly committed.

that Davis was searching for his first job after his incarceration, which reinforces a conclusion that he reasonably understood that his criminal record was a potential issue during the application process and that he intentionally misrepresented his criminal history when completing the application.

In light of the evidence that Davis intentionally misrepresented his criminal history on Westaff’s application forms, the Respondent may seek to prove in the compliance stage that these misrepresentations would have provided grounds for terminating Davis’ employment based on a preexisting, nondiscriminatory company policy. See *ADS Electric Co.*, 339 NLRB 1020, 1020 fn. 3 (2003); *Arrow Flint Electric Co.*, 321 NLRB 1208, 1210 (1996); *Escada (USA), Inc.*, 304 NLRB 845, 845 fn. 4 (1991), enf’d. 970 F.2d 898 (3d Cir. 1992).

ORDER

The National Labor Relations Board orders that the Respondent, EDRO Corporation d/b/a Dynawash, East Berlin, Connecticut, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Discharging or otherwise discriminating against employees for supporting International Association of Machinists & Aerospace Workers, AFL–CIO, or any other labor organization.

(b) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Vincent Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Davis whole for any loss of earnings and other benefits suffered as a result of his unlawful discharge in the manner set forth in the remedy section of the judge’s decision as amended by this Decision and Order.

(c) Compensate Davis for the adverse tax consequences, if any, of receiving a lump-sum backpay award, and file a report with the Social Security Administration allocating the backpay award to the appropriate calendar quarters.

(d) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Davis and, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

(e) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(f) Within 14 days after service by the Region, post at its East Berlin, Connecticut facility copies of the attached notice marked "Appendix."⁹ Copies of the notice, on forms provided by the Regional Director for Region 1, after being signed by the Respondent's authorized representative, shall be posted by the Respondent and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Respondent customarily communicates with its employees by such means. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. If the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since October 29, 2013.

(g) Within 21 days after service by the Region, file with the Regional Director for Region 1 a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

Dated, Washington, D.C. March 31, 2015

Philip A. Miscimarra, Member

Kent Y. Hirozawa, Member

Harry I. Johnson, Member

⁹ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

(SEAL) NATIONAL LABOR RELATIONS BOARD

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated Federal labor law and has ordered us to post and obey this notice.

FEDERAL LAW GIVES YOU THE RIGHT TO

Form, join, or assist a union

Choose representatives to bargain with us on your behalf

Act together with other employees for your benefit and protection

Choose not to engage in any of these protected activities.

WE WILL NOT discharge or otherwise discriminate against you for supporting International Association of Machinists & Aerospace Workers, AFL-CIO, or any other labor organization.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights listed above.

WE WILL, within 14 days from the date of the Board's Order, offer Vincent Davis full reinstatement to his former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

WE WILL make Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, less any net interim earnings, plus interest.

WE WILL compensate Davis for any adverse tax consequences of receiving a lump-sum backpay award, and WE WILL file a report with the Social Security Administration allocating his backpay to the appropriate calendar quarters.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Davis, and WE WILL, within 3 days thereafter, notify him in writing that this has been done and that the discharge will not be used against him in any way.

EDRO CORPORATION D/B/A DYNAWASH

The Board's decision can be found at <http://www.nlr.gov/case/01-CA-116211> or by using the

QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.



Jo Anne P. Howlett, Esq. and Meredith B. Garry, Esq., for the General Counsel.

Stephanie P. Antone, Esq. and Edward T. Lynch, Jr., Esq., for the Respondent.

DECISION

STATEMENT OF THE CASE

RAYMOND P. GREEN, Administrative Law Judge. I heard this case in Hartford, Connecticut, on June 3, 10 and 11, 2014. The charge and the amended charges in 01-CA-116211 were filed on November 1 and December 26, 2013, and January 29 and March 11, 2014. The charge and amended charges in 01-CA-116225 were filed on October 31 and December 19, 2013, and January 5 and March 11, 2014. The complaint, which issued on March 17, 2014, alleged that the Respondent on October 29, 2013, through, Westaff Inc., a temporary staffing agency, discharged Davis because he joined or assisted the Union or engaged in other concerted activity.

On the entire record, including my observation of the demeanor of the witnesses, and after considering the briefs filed, I make the following

FINDINGS AND CONCLUSIONS

I. JURISDICTION

The Respondent admits and I find that it is an employer engaged in interstate commerce within the meaning of Section 2(2), (6), and (7) of the Act. It also is admitted and I find that the Union is a labor organization within the meaning of Section 2(5) of the Act.

II. ALLEGED UNFAIR LABOR PRACTICES

EDRO, located in East Berlin, Connecticut, is engaged in the business of manufacturing industrial washing machines and dryers. A main customer is the Navy and one of the projects being worked on at the time of these events was the design for a dryer on a submarine. This is a family owned business with Barbara Kirejczyk, the

matriarch, being the Company's chairman. The Company's president is Edward Kirejczyk who is also in charge of sales. His brother, Scott Kirejczyk, is the operations manager. Both brothers are engineers. Caroline Douchicki, one of the spouses, is the vice president of finance.

At the time of these events, the nonfamily managers were Ken Bridges, who acted as the customer service manager and electrical engineering manager, Don Price who was the materials manager and Stephen Morris who was the engineering manager. Morris had been hired on April 10, 2013, to replace Bill Wentland who retired from that position in September, but who remained on as a part-time consultant. Morris' agreement was to do this job for 1 year with the option of continuing if both parties were satisfied. Morris was not satisfied and by December 2013, or earlier, he had made it known to management that although he would fulfill his 1-year commitment, he would leave earlier if they wanted him to.

Vincent Davis, the Charging Party, had previously been employed at Pratt and Whitney but had been separated from that job for some time due to a 9-month incarceration in 2011. Upon his release and no longer being employed by Pratt and Whitney, he sought employment and ultimately was contacted by a firm called Westaff which is engaged in finding potential employees and soliciting various employers to hire these people in the State of Connecticut.

In 2013, the Respondent was trying unsuccessfully to find qualified employees for a number of job positions including welding and quality control. As its own efforts were proving fruitless, it contacted Westaff for assistance. On August 12, 2013, EDRO entered into a contract with Westaff for the latter to seek and present qualified applicants for three open jobs; one of which was for a quality control person. In turn, Westaff made its own search and came up with a couple of candidates; the most promising being Vincent Davis.

Davis filled out a job application with Westaff and was interviewed first by both Scott Kirejczyk and Wentland on August 14, 2013. He had a second interview with Edward Kirejczyk on August 25 and the Company decided to employ him. The arrangement was that Westaff was to be Davis' nominal employer and that EDRO would pay his wage plus a premium to Westaff for Davis' services. At the end of 520 hours (13 weeks), EDRO had the option of hiring Davis as its own employee without paying an additional fee to Westaff. If EDRO decided to directly hire Davis before the 520 hours, it would incur a fee.

Notwithstanding the offer, Davis did not start to work until September because he was engaged in negotiations

regarding his pay and benefits. As to benefits, however, Westaff did not provide any benefits and EDRO does not offer benefits to new employees until after its own probationary period.

In any event, Davis commenced working at EDRO on September 30 and he worked exclusively in the factory under the direction of Morris. He received all of his work directions and supervision from EDRO management. Westaff had no actual work related relationship with Davis after he started work at EDRO. His initial pay rate was \$22 per hour with the understanding that if he received a satisfactory review, his pay would be increased to \$23 per hour for the next 6 months. It also was agreed that after the probationary period, he would receive the EDRO's benefit package.

It is my conclusion that although Westaff was his nominal employer, his real employer was EDRO. See *Mar-Jam Supply Co.*, 337 NLRB 337, 342-343 (2001), ALJ decision at fn. 8.

It is noted that Davis was neither asked by Westaff nor EDRO about his past legal problems and he did not volunteer that information to either company.

Soon after he started work, Davis began demanding that he should be given holiday pay notwithstanding that his agreement clearly did not provide for such pay. When he asked Morris, he was told that it was unlikely that the Respondent would change its practice of not providing benefits to new employees during the probationary period. Thereafter, Davis raised the issue with Westaff and with Scott Kirejczyk. He was again told that the Company did not provide such benefits to new employees.

On October 17, Scott Kirejczyk sent an email to Edward Kirejczyk asking if it was possible to offer Davis a compromise about his demand for holiday pay. This was rejected.

On or about October 22, Davis spoke to Edward Kirejczyk and asked to be given holiday pay. He was told that this was not going to happen. During this conversation, Edward Kirejczyk said that his wife had worked for Pratt & Whitney which had a 90-day probationary period. In response, Davis said that he had been a steward at Pratt & Whitney and that the contract there required only a 30-day probationary period. According to Davis, he said that if the Respondent treated the employees better, it would have a better chance of retaining its employees. At or near the end of this conversation, Davis said; "you get what you give." According to Edward Kirejczyk, Davis added; "I'm going to get you." The latter version is credibly denied by Davis.

Although Edward Kirejczyk testified that he took this statement as a threat, I don't think that it could reasonably

be viewed that way. On the other hand, the whole tenor of this conversation, illustrates a degree of cheekiness by an employee who had just been hired on a contingency basis with only the possibility of becoming a full-time employee. (The word *chutzpa* comes to mind.) Not only was Davis demanding that he get paid for something for which he was not contractually entitled, but he was aggressively pursuing this demand in a manner that in my opinion, would raise questions about his general willingness to accommodate himself to being an employee.

Later on October 22, the Company's management had a meeting where among other things, Davis' request for holiday pay was brought up and discussed. At this meeting, Edward Kirejczyk related his earlier conversation with Davis. In any event, the Company and Edward Kirejczyk in particular, decided not to discharge or discipline Davis. Instead, it was agreed that Morris should write up an evaluation of Davis with the possibility of giving in to Davis' demand for holiday pay. It should be noted that there was no discussion of Davis' criminal record at this meeting.

I should note that Edward Kirejczyk testified that he was initially inclined to discharge Davis after the conversation he had with him on the morning of October 22. In part, Kirejczyk testified that the other participants in the staff meeting indicated that there was a problem filling the quality control position and that he was persuaded that they should "hang on to this guy" or "try to work things out with him." He also testified that he felt that as a new employee, Davis was in no position to make demands for benefits to which he was not entitled. Indeed, had he discharged Davis on October 22, there could be no violation of the Act, since the Company had no reason to believe that Davis had contacted a union or engaged in any kind of concerted activity. (His efforts to gain holiday pay for himself was not concerted activity.)

The evidence shows that on the same day (Oct. 22, 2013), Davis contacted a union representative by phone and email. In these communications, he stated that he wanted to be involved in organizing the shop. The email also contains some rather intemperate remarks (not seen by the Company), which indicates to me that Davis' motive for seeking union representation was based in his animosity toward Edward Kirejczyk's refusal to meet his personal holiday pay demands.

In any event, a meeting at a local restaurant was arranged between a union representative and some employees of the Company for October 28. This was attended by Davis and several other employees who signed union authorization cards. It was agreed that Davis and some of the others would solicit employees at the plant

for the purpose of obtaining union authorization cards in preparation for the filing of an election petition with the NLRB.

On October 29, 2013, a number of events transpired.

According to Morris, on the morning of October 29, he attended the weekly staff meeting, after which he tendered his written evaluation of Davis. This was positive and stated that Davis' performance was meeting all of the Company's expectations. Morris testified that there was no discussion at the meeting about Davis.

On that same day, Davis and another employee solicited and obtained union authorization cards from a number of people.

According to Scott Kirejczyk, at some point after the regular staff meeting, the owners outside the presence of Steve Morris and Ken Bridges, talked about Davis and decided to cease using his services. In this regard, Scott Kirejczyk testified that his sister Caroline, either before or during this meeting, did a Google search and discovered that Davis had been convicted of an assault. He testified that given what Edward Kirejczyk had reported the week before, and with this new information relating to the criminal record, it was decided that Davis presented a threat to other employees and should be let go.

According to Edward Kirejczyk, the family met after the regular weekly meeting and decided that Davis' services were no longer required. He testified that they talked about the holiday pay issue and that the others agreed with him that Davis should be let go. It is noteworthy, however, that Edward Kirejczyk did not testify that Davis' criminal record was discussed. Nor did he testify that there were any other reasons discussed for terminating Davis.

Morris testified that at around 4:30 p.m. on October 29, Scott Kirejczyk told a group of management people that Vincent Davis was no longer going to be working at EDRO; that he had been involved in union organizational efforts as reported by Sal Ortiz, one of the Company's welders. Morris testified that this statement by Scott Kirejczyk was also heard by Edward Kirejczyk and Ken Bridges. It is noted that not one of these people denied that the statement was made. Thus, Morris' testimony about this transaction, which on its own terms was credible, stands un rebutted.

On the evening of October 29, Davis received a message at home that his services were no longer required. When he attempted to find out from Morris and Chloe Zanardi (from Westaff), why he was discharged, he received no further information.

The Respondent argued that one of the reasons it terminated Davis was because of what Edward Kirejczyk perceived as a threat made to him on October 22, coupled

with the discovery of his criminal record on October 29. This is not persuasive. For one thing, despite the remark that Davis made on October 22, the Company decided on that date that it would keep him on despite the remark and evaluate his performance. Secondly, I am convinced based on the testimony of Edward Kirejczyk and the credited testimony of Steve Morris that the Company first learned about Davis' criminal record after October 29 and therefore after it decided to terminate him. Moreover, such after-acquired evidence would not, in my opinion, affect the outcome of this case or disqualify Davis from being reinstated or being awarded backpay. In this regard, the evidence shows that the Respondent has, in the past, hired and continued to employ individuals with criminal records. Further, the fact that Davis did not disclose his record would not disqualify him because he wasn't asked to and chose not to volunteer that information. He clearly did not make any false statements about this subject during his hiring process.

Nor do I find persuasive, the Company's argument that letting Davis go was justified by a drop in business. It may be true that there was some drop in business. But as testified by Edward Kirejczyk, this was largely due to the governmental sequestration. And in this respect, he understood (quite reasonably), that although some Navy orders were delayed, they would be forthcoming when the sequestration ended. He testified that notwithstanding the fact that orders were delayed, the company nevertheless was building machines on speculation.

In conclusion, the un rebutted and credible testimony of Morris establishes that one day after Davis and other employees met with the Union, Davis was discharged because, as Scott Kirejczyk put it, he was involved with union organization efforts. I find that the Respondent's defenses are unpersuasive. I also conclude that the Respondent was the de facto employer of Davis and that it illegally discharged him on October 29, 2013, because of his union activity.

REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find that it must be ordered to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The General Counsel, in addition to the standard remedy for 8(a)(1) and (3) cases, requests that the Respondent be required to read the notice to the employees at a meeting held on worktime. In my opinion, this remedy is not required in this case.

From the Board's inception, it has as part of its usual remedial orders, required the offending party to post a notice describing employee rights under the Act and

promising to abide by those rights. *Pennsylvania Greyhound Lines, Inc.*, 1 NLRB 1 (1935).

Requiring an owner or high official of a company or a union to actually read aloud the notice to its assembled employees has not been typically required except in unusual circumstances. In *Federated Logistics & Operations*, 340 NLRB 255, 256–257 (2003), the Board described this as an “extraordinary” remedy. This remedy, along with others, was imposed in a case where the employer (a) unlawfully interrogated employees; (b) created the impression of surveillance; (c) solicited grievances; (d) promised benefits; (e) threatened employees with the loss of existing benefits; (f) threatened to move its operations; (g) withheld benefits and (h) discriminatorily suspended employees for engaging in protected activity. Moreover, in that case, the results of an election were overturned and the Board ordered a new election. Given these findings, in the context of a pending election situation, a Board majority stated:

The Board may order extraordinary remedies when the Respondent’s unfair labor practices are “so numerous, pervasive, and outrageous” that such remedies are necessary “to dissipate fully the coercive effects of the unfair labor practices found.” *Fieldcrest Cannon, Inc.*, 318 NLRB 470, 473 (1995) (and cited cases). For example, a public reading of the notice is an “effective but moderate way to let in a warming wind of information, and more important, reassurance.” *J.P. Stevens & Co. v. NLRB*, 417 F.2d 533, 539–540 (5th Cir. 1969). In addition, the Board has ordered Respondents to supply up-dated names and addresses of employees to the Union because that “will enable the Union to contact all employees outside the [workplace] and to present its message in an atmosphere relatively free of restraint and coercion.” *Excel Case Ready*, 334 NLRB 4, 5 (2001) (quoting *Blockbuster Pavilion*, 331 NLRB 1274, 1275 (2000)). Further, when a respondent “has engaged in such egregious or widespread misconduct as to demonstrate a general disregard for the employees’ fundamental statutory rights,” the Board has issued a broad order for the Respondent to refrain from misconduct “in any other manner,” instead of a narrow order to refrain from misconduct “in any like or related manner.” *Hickmott Foods*, 242 NLRB 1357 (1979).

There have been a number of very recent cases where the Board has required the reading of a notice. But those cases, in my opinion, involve facts substantially different and more egregious than those in the present case. For example, in *Jason Lopez’ Planet Earth Landscape Inc.*, 358 NLRB No. 46 (2012), the Respondent had; (a) illegally laid off the leader of the organizational campaign

who also was a witness in the underlying representation case; (b) had illegally laid off two employees in a unit of 15 employees right after the election; and (c) committed many other serious violations, including promising benefits and “threatening to close the business and reopen it under a different name.”

In *Carey Salt Co.*, 360 NLRB No. 38 (2014), the Board concluded that the Respondent violated Section 8(a)(1), (4), and (5) of the Act by (a) threatening employees that it would withhold a scheduled wage increase until it successfully resisted a petition for injunctive relief; (b) delaying or withholding a scheduled wage increase because of the injunction litigation; and (c) by refusing to bargain in good faith by conditioning bargaining on the union persuading the Board to discontinue the injunction litigation. In that case, the Board also noted that the Respondent was a repeat offender in that a prior unfair labor practice finding had been enforced in substantial part by the Fifth Circuit Court of Appeals.

Among the cases cited by the General Counsel for the proposition that a reading of the notice would be appropriate are *Excel Case Ready*, 334 NLRB 4, (2001); *Fieldcrest Cannon, Inc.*, 318 NLRB 470 (1995); and *McAllister Towing & Transportation Co.*, 341 NLRB 394 (2004). But all of those cases, except perhaps for *McAllister*, involved situations where the respective respondents engaged in far more numerous and egregious violations than what happened in the present case. Moreover, they all involved situations where the violations occurred in the context of an election where the results had been overturned and where a rerun election was imminent.

In *Excel Case Ready*, supra, the Board found that the Respondent, at the outset of a union organizing campaign, (a) coercively interrogated employees; (b) threatened them with the loss of their 401(k) plan; (c) threatened to make their lives a “living hell” and (d) illegally discharged five employees in a unit of 32 employees.

In *Fieldcrest Cannon*, supra, the Board found, among other things, that the Respondent (a) discriminatorily demoted an employee because of her union activities; (b) illegally withheld a 5.5-percent wage increase from its employees; (c) threatened employees with discharge for seeking union representation or unless they revoked union authorization cards; (d) threatened employees with plant closure; (e) threatened employees with deportation; (f) required employees to wear an-union t-shirts; (g) told employees that selecting a union would be futile; (h) threatened to impose more harsh working conditions on employees who supported the Union; (i) created the impression that employee union activities were being surveilled; and (j) favored antiunion employees over

prounion employees with respect to the enforcement of various company rules.

In *McAllister*, supra, the Board ordered the Respondent to permit a Board agent to read the notice aloud to the assembled employees in the presence of a management official. In that case, the Board held that the Respondent violated the Act by accelerating the timing of a mid-year wage increase in order to influence the outcome of an election. It also found unlawful, the Respondent's post-election extension of its 401(k) plan to employees and the granting of five paid holidays. The *McAllister* case did not involve the discharge or disciplinary actions against any of its employees. Thus, *McAllister* is the one case where the violations found were not so numerous nor egregious. But, it should be noted that the *McAllister* case, in addition to involving a rerun election, involved a component that indicated a disregard for the Board's processes, which may have warranted a conclusion that it would likely violate the Act in the future. In that case, the Board found that Respondent's counsel deliberately refused and/or delayed the production of documents that had been subpoenaed by the General Counsel. The Board stated, inter alia, that this course of behavior was carried out in a way that was "likely to prejudice the General Counsel's case and the overall proceeding."

Summarizing the above, I do not think that the conduct of the Respondent in this particular case is sufficiently egregious to warrant the granting of this "extraordinary" remedy. Nor has it been shown that the Respondent has violated the Act in the past or that it likely will violate the Act in the future. Perhaps the General Counsel's view is that requiring a Respondent to read a notice aloud is not so extraordinary after all and should be granted as a matter of routine. But that is not the current law and I cannot recommend that such an Order be granted under present case law.¹

Having concluded that the Respondent unlawfully discharged Vincent Davis, it must offer him reinstatement and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him. Backpay shall be computed in accordance with *F. W. Woolworth Co.*, 90 NLRB 289 (1950), with interest at the rate prescribed in *New Horizons*, 283 NLRB 1173 (1987), compounded daily as prescribed in *Kentucky River Medical Center*, 356 NLRB No. 8 (2010). The Respondent shall also be required to expunge from its files

any and all references to the unlawful discharge and to notify the employee in writing that this has been done and that the unlawful discharge will not be used against him in any way. The Respondent shall file a report with the Social Security Administration allocating backpay to the appropriate calendar quarters. The Respondent shall also compensate Davis for the adverse tax consequences, if any, of receiving one or more lump-sum backpay awards covering periods longer than 1 year. *Don Chavas, LLC d/b/a Tortillas Don Chavas*, 361 NLRB No. 10 (2014).

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended²

ORDER

The Respondent, EDRO Corporation, d/b/a Dynawash, its officers, agents, and representatives, shall

1. Cease and desist from

(a) Discharging employees because of their union or protected concerted activity.

(b) In any like or related manner interfering with, restraining, or coercing employees in the rights guaranteed to them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Vincent Davis, full reinstatement to his former job, or if that job no longer exists, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed.

(b) Make Vincent Davis whole for any loss of earnings and other benefits suffered as a result of the discrimination against him, in the manner set forth in the remedy section of this decision.

(c) Remove from its files any reference to the unlawful actions against Vincent Davis Atkinson and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(d) Reimburse Davis an amount equal to the difference in taxes owed upon receipt of a lump sum backpay payment and taxes that would have been owed had there been no discrimination against him.

(e) Submit the appropriate documentation to the Social Security Administration so that when backpay is paid to Davis it will be allocated to the appropriate periods.

(f) Within 14 days from the date of this Order, remove

¹ I note that the General Counsel cites *Durham School Services L.P.*, 360 NLRB No. 85 (2014). But that case simply revised the standard notice remedy so that a hyperlink would be attached to the notice so that the Board's decision would be more accessible to employees. The Order in that case did not require the notice be read aloud to the employees.

² If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

from its files any reference to the unlawful action against Davis and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

(g) Preserve and, within 14 days of a request, or such additional time as the Regional Director may allow for good cause shown, provide at a reasonable place designated by the Board or its agents, all payroll records, social security payment records, timecards, personnel records and reports, and all other records, including an electronic copy of such records if stored in electronic form, necessary to analyze the amount of backpay due under the terms of this Order.

(h) Within 14 days after service by the Region, post its East Berlin, Connecticut facility, copies of the attached notices marked "Appendix."³ Copies of the notices, on forms provided by the Regional Director for Region 1, after being signed by the Employer's authorized representative, shall be posted by the Employer and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. In addition to physical posting of paper notices, notices shall be distributed electronically, such as by email, posting on an intranet or an internet site, and/or other electronic means, if the Employer customarily communicates with its employees by such means. Reasonable steps shall be taken by the Employer to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Employer has gone out of business or closed the facilities involved in these proceedings, the Employer shall duplicate and mail, at their own expense, a copy of the notice to all current employees and former employees employed by the Employer at any time since October 29, 2013.

Dated, Washington, D.C. September 9, 2014

APPENDIX

NOTICE TO EMPLOYEES POSTED BY ORDER OF THE NATIONAL LABOR RELATIONS BOARD

³ If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

FEDERAL LAW GIVE YOU THE RIGHT

- To organize
- To form, join, or assist any union
- To bargain collectively through representatives of their own choice
- To act together for other mutual aid or protection
- To choose not to engage in any of these protected concerted activities.

WE WILL NOT discharge or discipline employees because of their union or protected concerted activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce employees in the rights guaranteed them by Section 7 of the Act.

WE WILL offer Vincent Davis, full reinstatement to his former job, or if that job no longer exist, to a substantially equivalent position, without prejudice to his seniority or any other rights or privileges previously enjoyed and make him whole for any loss of earnings and other benefits suffered as a result of the discrimination against him.

WE WILL remove from our files any reference to the unlawful actions against Vincent Davis, and within 3 days thereafter, notify him in writing, that this has been done and that the discharge will not be used against him in any way.

EDRO CORPORATION

The Administrative Law Judge's decision can be found at www.nlrb.gov/case/01-CA-116211 or by using the QR code below. Alternatively, you can obtain a copy of the decision from the Executive Secretary, National Labor Relations Board, 1099 14th Street, N.W., Washington, D.C. 20570, or by calling (202) 273-1940.

